TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

In the case ECS-7/18, the Secretariat of the Energy Community against the Republic of Moldova, the

ADVISORY COMMITTEE,

composed of
Rajko Pirnat, Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

# OPINION

## I. Procedure

By e-mail dated 17 September 2020 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-7/18 against the Republic of Moldova. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request of 9 September 2020 the Secretariat seeks a Decision from the Ministerial Council declaring that the Republic of Moldova by not transposing into national law the provisions of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants[1] and Chapter III, Annex V and Article 72 paragraph 3 and 4 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)[2], failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

The Republic of Moldova submitted a reply to the Reasoned Request dated 28 October 2020 and the Secretariat answered this this reply on 7 December 2020.

The Secretariat and the Republic of Moldova agreed that a public hearing could be dispensed with according to Article 8 (1) of the Rules of Procedure of the Energy Community Advisory Committee as amended.

[1]OJ EC L 309, 27.11.2001, p. 1 – 21.
[2]OJ EU L 334, 17.12.2010, p. 17–119.

## II. Provisions allegedly violated by the Contracting Party concerned

Article 12 of the Treaty reads:

> *Each Contracting Party shall implement the acquis communautaire on environment in compliance with the timetable for the implementation of those measures set out in Annex II.*

Article 16 of the Treaty reads:

> *The "acquis communautaire on environment", for the purpose of this Treaty, shall mean (…)*
> *(iii) Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, (…)*
> *(v) Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control, (…)*

The content of those provisions shall not be displayed in its entirety, as it is not entirely relevant for the legal assessment undertaken in this Opinion.

## III. Preliminary Remarks

According to Article 32 (1) Dispute Settlement Rules 2015, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned.

The Advisory Committee, exercising its duty to give an Opinion on the Reasoned Request does not duplicate the procedure and therefore does not collect evidence itself. In a case where the Parties agree that a public hearing according to Article 8 of the Rules of Procedure of the Energy Community Advisory Committee, the Advisory Committee can only render its Opinion based on the documents provided by the Energy Community Secretariat as the case file. It gives its Opinion based on undisputed facts. Where the facts are not sufficiently determined by the Energy Community Secretariat, the Advisory Committee is not in a position to give its decisive legal opinion on these allegations; instead, such cases of incomplete determination of facts are pointed out in the Opinion of the Advisory Committee.

On the basis of these principles the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

## IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that the Republic of Moldova by not transposing into national law the provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72 paragraph 3 and 4 of Directive 2010/75/EU, failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.
The Republic of Moldova submitted a reply on 29 October 2020 and did not insist on a public hearing. Hence, the Advisory Committee's assessment is entirely based on the procedural documents provided by the Energy Community Secretariat and the Republic of Moldova and the arguments presented therein.

In its reply of 28 October 2020 the Republic of Moldova contends that its authorities continue to use its best efforts to harmonise new legislation with commitments set out in the Treaty and the EU – Moldova Association Agreement.[3] It especially refers to obligations under this Association Agreement in Chapter 16 "Environment", Annex XI (Industrial pollution and industrial accidents). Moldova raises the defence of a different deadline of transposition under the said Association Agreement and justifies the lack of implementation be reference to national legislative proceedings requesting a rather time consuming legislative impact and public consultation. In essence, Moldova pleads the defence of an obligation arising of a different international agreement or treaty. In its reply to the Reasoned Request, the Republic of Moldova also claims internal difficulties in the domestic legislative system, fluctuation of staff and the consequences of the Covid-19 pandemic as a reason for delay in transposition.

It follows from Article 16 of the Treaty and Annex II, point 3 that Moldova was under obligation by virtue of those provisions to transpose into national law the provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72 paragraph 3 and 4 of Directive 2010/75/EU within a deadline of 31 December 2017.

In reply to the pleas raised by Moldova based on to the extent of internal difficulties in the domestic legislative system and fluctuation of staff, the Secretariat submits that according to settled case-law of the Court of Justice of the European Union (CJEU) and based on Article 94 of the Treaty, a Contracting Party cannot plead provisions, practices or situations prevailing in its internal legal system in order to justify a failure to comply with its obligations and time limits.

The Advisory Committee emphasizes that in EU law and according to settled case law of the CJEU a Contracting Party cannot refer to domestic legal order to justify failure to observe obligations arising under EU law.[4]

The Advisory Committee considers further that the said case law represents the European version of the *pacta sunt servanda* rule in international law. It namely follows from the codification of customary rule of international law *pacta sunt servanda* in Article 26 of the 1969 Vienna Convention that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[5] The said 1969 Vienna Convention is supposed to regulate the international treaties between states. While it might be argued that this convention is not binding upon an international organisation, it should be recalled that the *pacta sunt servanda* represents also a rule of international customary law. Regarding obligations arising from treaties between international organisations and states the same customary rule of *pacta sunt servanda* was codified in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[6] The said legal act of international law is not yet in force yet it contains a codification of virtually identical customary rule in its Article 26. The Advisory Committee considers that the customary rule of international law of *pacta sunt servanda* shall also apply to regulate rights and obligations between the Energy Community and Moldova.

[3]Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ EU L 260, 30.8.2014, p. 4–738 as modified.
[4] CJEU, *Commission v Slovenia*, C-402/08, EU:C:2009:157, pt. 12 and *Commission v Germany*, C-503/04, EU:C:2007:432, pt. 38
[5]United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969.
[6]Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 21 March 1986

Under customary international law (also codified in Article 27 of the said 1969 Vienna Convention) Moldova may not invoke the provisions of its internal law as justification for its failure to perform an international treaty. Also the codification of customary law of treaties between states and international organisations in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations – not yet in force – applies virtually an identical rule in its Article 27(1) and (2).

Thus the defence raised by Moldova referring to national legislative proceedings, extent of internal difficulties in the domestic legislative system and fluctuation of staff, novelty of the matter meaning no existing legal framework, assessment of impact of new legislation and public consultation cannot stand neither in EU nor in international law.

As regards the defence based on different deadlines for the implementation of the acquis (relevant provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72 paragraph 3 and 4 of Directive 2010/75/EU) in the EU – Moldova Association Agreement as *lex specialis* it has to be said that the said agreement with the EU is by virtue of general principle of law of privity of international treaties and agreements (*pacta tertiis nec nocent nec prossunt*) not binding on the Energy Community.

This rule has also been incorporated in the EU – Moldova Association Agreement where the parties to this agreement have been defined in Article 461.

Article 461 of the EU – Moldova Association Agreement defined parties and reads as:

"*For the purposes of this Agreement, the term 'the Parties' means the EU, or its Member States, or the EU and its Member States, in accordance with their respective powers as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union, and, where relevant, it also means Euratom, in accordance with its powers under the Treaty establishing the European Atomic Energy Community, of the one part, and the Republic of Moldova, of the other part.*"

The Advisory Committee considers that the EU – Moldova Association Agreement does not include the Energy Community as being a party to that agreement and does not impose any obligation as *lex specialis* that would be contrary to the Treaty.

The application of rule of privity of international treaties and agreements is not barred by Article 103 of the Treaty. According to that provision:

*"Any obligations under an agreement between the European Community and its Member States on the one hand, and a Contracting Party on the other hand shall not be affected by this Treaty. Any commitment taken in the context of negotiations for accession to the European Union shall not be affected by this Treaty."*

In the first place, the Advisory Committee, in its Opinion given in Case ECS-3/08, delivered on 10 October 2016, concerning Serbia, already rejected pleas based on an alleged primacy of bilateral agreements concluded between the Contracting Parties and the EU such as the EU-Moldova Association Agreement over the Treaty. The Advisory Committee ruled that that:

"*Article 103 of the Treaty is not a general derogation from obligations arising from the law of the Energy Community but allows Contracting Parties to enter into commitments which go beyond the acquis of the Energy Community in the perspective of accession and full incorporation of the* acquis communautaire. *The mere fact of ongoing accession negotiations is not sufficient to suspend all application of the existing law. Serbia did not explain which specific commitment of its accession negotiations would authorise a derogation from the acquis communautaire concerning congestion management.*".[7]

Also in this case Moldova did not explain which specific commitment of its accession negotiations under the EU – Moldova Association Agreement would require that the deadline of 31 December 2017 for implementing the environmental *acquis communautaire* in question in this case shall be repealed and not respected.

Article 30(3) and (4) of the 1969 Vienna Convention deals with application of successive treaties relating to the same subject matter and provides:

„*3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*

*4. When the parties to the later treaty do not include all the parties to the earlier one:*
*(a) as between States parties to both treaties the same rule applies as in paragraph 3;*
*(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*"

The said customary rule of international law of privity of treaties (*pacta tertiis*) is also codified in Article 30 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations that is not yet in force.

The Advisory Committee considers that Contracting Parties to the Energy Community are not identical to those to EU – Moldova Association agreement. Thus, the principle of privity of international treaties means that rights and obligations of parties to the Treaty are set solely by the said Treaty. Consequently, the defence built on different implementation deadlines under the EU – Moldova Association Agreement shall have no bearing as far as obligations under the Treaty are concerned.

Finally, the plea based on Covid-19 is to be assessed. By raising such a plea, Moldova contends in substance a *force majeure* releasing it temporary from the obligation to perform the Treaty. While it might be correct that Covid-19 presents certain elements of *force majeure*, it is also true that it is an epidemic that came to Europe in January and February 2020. Moldova on the other hand was under obligation to implement the environmental *acquis communautaire* by 31 December 2017. That deadline was not complied with at least two years before Covid-19 came from China to Europe (and to Moldova). Thus, the plea of *force majeure* is inoperative. Moldova cannot rely on unforeseeable circumstances or *force majeure* in circumstances in this case where a diligent and prudent Contracting Party would have been able to avoid the expiry of the period for implementation. Moldova's defence could stand only in case of event that could not be avoided at the date of 31 December 2017. The argument based on Covid-19 cannot stand and it comes close to pleadings *mala fide* and cannot be accepted.

It thus follows that Moldova's defences raised in the letter of 28 October 2020 cannot stand.

[7] See Opinion in the case ECS-3/08 from 10 October 2016

## V. Conclusions

The Advisory Committee considers that the Republic of Moldova by not transposing into national law the provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72 paragraph 3 and 4 of Directive 2010/75/EU, failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

Done in Vienna on 25 January 2021

On behalf of the Advisory Committee

Wolfgang Urbantschitsch, President